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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 640

PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

SAM FRIEDMAN,
Defendant-Appellant

PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

SAM PRASKA
Defendant-Appellant

STATEMENT OF JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, defendants-appellants submit herewith their statement setting forth the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Court of Appeals of the State of New York affirming the judgment of the Appellate Division of the Supreme Court of the State of New York which in turn affirmed the judgment of the Court of Special Sessions of the City of New York entered in these cases.

Opinion Below

The opinion of the Court of Appeals is reported at 302 N. Y. 75, and the Appellate Division decision is noted at 276 App. Div. 1008. A copy of the Court of Appeals opinion is attached hereto as Appendix A. No opinion was written by the Court of Special Sessions or by the Appellate Division.

Questions Presented

The following questions are presented by this appeal:

1. Whether the New York Sabbath Law (Article 192 of the New York Penal Law) is a law respecting an establishment of religion and is, therefore, invalid in its entirety under the First Amendment to the United States Constitution which is made applicable to the States by the Fourteenth Amendment.

2. Whether the New York Sabbath Law is constitutionally invalid as violative of the freedom of religion provision of the United States Constitution, because it fails to exempt from its operations persons whose religious convictions compel them to observe a day other than Sunday as their holy day of rest.

3. Whether the New York Sabbath Law by reason of its "crazy quilt" pattern of inclusions and exclusions, is arbitrary and discriminatory and therefore violative of the "equal protection of the law" and "due process" provisions of the United States Constitution.

4. Whether the New York Sabbath Law has been discriminatorily applied against the defendants herein and persons similarly situated in violation of the "equal protection of the law" provision of the United States Constitution.

Statute Involved

Article 192 of the New York Penal Law, generally known as the New York Sabbath Law, is set forth in Appendix B hereto.

Statement

This is an appeal from a judgment of the Court of Appeals of the State of New York entered on December 1, 1950, affirming a judgment of the Appellate Division, First Department, which had affirmed, without opinion, judgments of conviction rendered by the Court of Special Sessions of the City of New York, County of New York, on June 22, 1949. Each of the defendants was charged by information with publicly selling and offering for sale uncooked meat on November 14, 1948, in violation of Section 2147 of the Sabbath Law of the State of New York. After trial in the Court of Special Sessions, each of the defendants was convicted and each was sentenced to pay a fine of $10 or spend two days in the City Prison.

The basic contention urged by the defendants is that their conviction constitutes an infringement of their rights under the First and Fourteenth Amendments of the United States Constitution. This contention was asserted first by a series of timely and proper motions to dismiss the informations against the defendants at the close of their case in the Court of Special Sessions. Each of the constitutional questions raised herein was explicitly relied on in support of the motions to dismiss. (Record,* fols. 257-270.) The Court considered the constitutional issues, denied the motions, and found the defendants guilty as charged. (Record, fol. 278.) Each of the constitutional arguments herein urged by the defendants was expounded by oral

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* Citations to the "Record" throughout this Statement refer to the Record submitted to the Court of Appeals.

arguments and in the briefs of the defendants before both the Appellate Division and the Court of Appeals. These constitutional issues were considered and decided adversely to the defendants by both Courts and were expressly discussed in the opinion of the Court of Appeals. (Appendix A.)

Both defendants, orthodox adherents to the Jewish faith, are retailers of kosher meat in the City of New York. Both possess a fixed immutable belief in the sanctity of Saturday as the Sabbath on which they may not trade or labor. Neither has ever performed any labor or engaged in any business on Saturday. (Record, fols. 162-163, 272.)

At the trial, the defendants conceded that they had engaged in the retail sale of uncooked meat on Sunday but proved or offered to prove the following:

1. That they regularly observe Saturday as their holy time and do not trade or labor on that day. (Record, fols. 162-163, 272.)

2. That the sale of meats upon which the information was based was conducted in such manner as not to interrupt or disturb other persons observing the first day of the week as holy time. (Record, fols. 173-174, 234-235.)

3. That for many years there have been widespread violations of the New York Sabbath Law by large commercial enterprises such as radio and television stations, sports stores, chain stores, etc., but that such violations have been acquiesced in and have not been prosecuted by the police authorities, and that such acquiescence constitutes the effectuation of an intention of willful discrimination against small merchants. (Record, fols. 145-155, 202-214.)

Jurisdiction

The judgment of the Court of Appeals was entered on December 1, 1950. A petition for appeal is presented to

the United States Supreme Court herewith, to wit, on February 13th, 1951. The jurisdiction of the Supreme Court to review this judgment by appeal is conferred by Title 28, U. S. Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in these cases. *Williams* v. *People of the State of New York*, 337 U. S. 241 (1949); *Railway Express Agency* v. *People of the State of New York*, 336 U. S. 106 (1949); *Niemotko* v. *State of Md.* 19 Law Week 4095 (1/15/51).

The Questions Are Substantial

A. The Sabbath Law is an Aid to the Establishment of Religion.

Defendants' contention that compulsory Sabbath Law statutes are laws respecting an establishment of religion in violation of the First Amendment has never before been presented to nor considered by the Supreme Court. Those Supreme Court cases which upheld the constitutionality of State Sunday Laws (*Hennington* v. *Georgia*, 163 U. S. 299 (1896); *Petit* v. *Minnesota*, 177 U. S. 164 (1900)), were decided before the "establishment of religion" clause of the First Amendment was held to be applicable to the States by reason of the Fourteenth Amendment. *Everson* v. *Board of Education of Township of Ewing*, 330 U. S. 1 (1947); *McCollum* v. *Board of Education*, 333 U. S. 203 (1948). Moreover, the full meaning and implications of the "establishment of religion" clause were not fully defined by the Supreme Court until the *Everson* and *McCollum* cases were decided. In both these cases the Supreme Court stated:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions,

or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government, can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' " *Everson* case *supra*, 330 U. S. at pp. 15-16; *McCollum* case, *supra*, 333 U. S. at pp. 210, 211.

The defendants contended before the Courts of New York and contend here that a statute compelling observance of Sunday and only Sunday as a day of rest constitutes an unconstitutional preferential aid to certain religious denominations. A substantial question is thus raised for the first time in the Supreme Court as to the conflict between Sunday laws and the establishment of religion clause of the First Amendment. The question to be resolved is an important one: Are *Hennington* v. *Georgia* and *Petit* v. *Minnesota* still law in view of the *Everson* and *McCollum* decisions?

Defendants submit that the historical background of the New York Sabbath Law clearly establishes its religious background and its function as an act of the State for the promotion of religious observance. The earlier versions of this statute did not merely require abstinence from work but also emphasized attendance at religious services. Johnson & Yost, *Separation of Church and State*, p. 224; *People* v. *Hoym*, 20 How. Pr. (N. Y.) 76, 78 (1860). Judicial references to Sunday as the Christian Sabbath are numerous.

See, e.g., *People* v. *Moses*, 140 N. Y. 214, 215 (1893); *People* v. *Dunford*, 207 N. Y. 17, 20 (1912); *Moore* v. *Owen*, 58 Misc. 332, 338 (1908). In *People* v. *Hoym*, 20 How. Pr. (N. Y.) 76-78 (1860), the Court stated:

> "The learned counsel of the plaintiffs has entered largely into the question of the origin and sanction of the Christian Sabbath. It may not be essential, but it is far from irrelevant to the decision of the present case, to sustain the divine authority of its institution."

Although compulsory attendance at church services was discontinued by the end of the 18th Century, compulsory abstinence from labor on Sunday and Sunday alone, has been continued in the present law. Defendants contend that the present law continues to be a religious law because:

1. The New York legislature has evidenced no intent to change the religious motivation of the law but on the contrary continues to call the statute "the Sabbath Law" and its violation "Sabbath breaking." (New York Penal Law, Section 2141.)

2. Amendments to the law indicate its continued religious motivation by permitting activities such as sports and entertainment only during hours which would not conflict with church attendance. (New York Penal Law, Sections 2145, 2154.)

3. The law, which the Court of Appeals held is a health statute providing for one day's rest in seven (Instant cases, 302 N. Y. at 79-80, App. A) does not require operators of a great many exempted trades and businesses to rest at all, even on one day in seven. Thus, the operators of butcher shops, such as defendants, must abstain from trade or labor one day in seven, but the operator of a tobacco shop or gasoline station (New York Penal Law, Section 2147, subd. 4) need not abstain from trade or labor for any period of time.

Moreover, municipalities may, by local option, permit pursuit of certain occupations (e.g., theater, sports) on Sunday (New York Penal Law, Sections 2152-a, 2154), while the operators of these enterprises residing in other communities are not so favored. Obviously, considerations of health and physical welfare are irrelevant.

4. The statute designates Sunday as *the* day of rest; there is no correlation between health and a *particular* day's abstention from labor. Again, it is clear that the physical welfare of the State's inhabitants is not the motivating cause for the Sunday law.

5. The New York legislature has conclusively recognized that the Sabbath Law is not a health statute by enacting, completely independent of the Sunday law, a one day rest in seven statute. (New York Labor Law, section 161).

B. The Sabbath Law Violates Defendants' Freedom of Religion

Whatever the reason for its passage, there is no doubt that the New York Sabbath Law constitutes an unconstitutional infringement upon the liberty of those observing a day other than Sunday as holy time. The Supreme Court of the United States has never expressly stated this proposition, because the issue has never before been presented; this case offers the opportunity for explicit consideration of this important problem for the first time. We submit that the Sabbath Law unconstitutionally restricts religious liberty by placing those whose convictions compel them to observe a day other than Sunday as holy time at a competitive disadvantage. The Sabbath Law substantially penalizes the seventh-day observer for adhering to his religious faith. The sanction imposed by the State for observing a day other than Sunday as holy time is certainly more serious economically than the imposition of a license tax for preach-

ing, which the United States Supreme Court has twice held to be an unconstitutional restriction on religious liberty. *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943); *Follett* v. *Town of McCormick,* 321 U. S. 573 (1944).

It should be noted that the usual presumption of constitutionality supporting legislation is balanced, in legislation regulating rights secured by the First Amendment, by "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945); *Marsh* v. *Alabama,* 326 U. S. 501, 509 (1946); *Prince* v. *Massachusetts,* 321 U. S. 158, 164 (1944). "Any attempt to restrict these liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945). See also *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 639 (1943). Moreover, it must be established with equal clarity that the restriction imposed upon the rights guaranteed by the First Amendment is necessary to meet the danger. "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945). "Mere legislative preference for one rather than another means for combating substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." *Thornhill* v. *Alabama,* 310 U. S. 88, 95-96 (1940). See also *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 639 (1943).

The restriction on religious liberty embodied in the New York Sabbath Law is not clearly and immediately necessary to achieve the end sought, i. e., one day's rest in seven. Ob-

viously, this end can be achieved by allowing seventh-day observers, such as the appellants herein, to observe Saturday as their day of rest. That such a procedure would be practicable is obvious from the fact that in respect to labor other than retail trading, the New York law does ~~not~~ permit substitution of another day for Sunday. (New York Penal Law, Section 2144.) Moreover, other states, *e. g.*, Oklahoma and Ohio, have had such exemptions for retail traders in their Sabbath laws for many years, without any difficulty in enforcement. *Krieger* v. *State*, 12 Okla. Cr. 566 (1916); *State* v. *Chesney*, 29 Okla. Cr. 251 (1925); *Robins* v. *State*, 19 Ohio N. P. (N. S. 606 (1915); *Canton* v. *Nist*, 9 Ohio St., 439 (1859). The exemption applicable in New York to other than retail trade and to retail trade in Oklahoma and Ohio is conditioned only upon non-interference with the rest and repose of those observing Sunday. It is not disputed that the acts committed by defendants and others similarly situated do not disturb the rest and repose of any person. (Record, fols. 173-174, 234-235.)

C. The Sabbath Law Violates the Fourteenth Amendment

Section 2147 of the Penal Law unconstitutionally denies the appellants and others similarly situated the equal protection of the law and deprives them of their liberty in violation of the Fourteenth Amendment of the Federal Constitution. Even if the Sabbath Law is deemed an exercise of the state's police power for the protection of public health, it is nevertheless unconstitutional since, without justification, it operates unequally and discriminatorily. Thus the statute permits the sale of bread, milk and eggs on Sunday, but prohibits the sale of meat and fish. It permits the sale of gasoline, oil and tires on Sunday, but not antifreeze or road maps. It permits the sale of real property, but not personal property; beer, but not butter. It permits

one to attend a professional football game on the Lord's Day, but does not permit him to have his hair cut. The entire Sabbath Law presents a "crazy quilt" pattern of inclusions and exclusions completely inconsistent with constitutional requirements of equality and reasonable classification.

Some reasonable basis for a legislative classification must exist. *Jones* v. *Union Guano Co.*, 264 U. S. 171 (1924); *Gulf Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150 (1897). Legislative inclusion and exclusion which rests exclusively upon caprice does not satisfy the constitutional requirement of equality. *Binney* v. *Long*, 299 U. S. 280 (1936); *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422 (1936). Numerous state courts have recognized that the usual Sunday Law classifications are arbitrary and unconstitutional. *Denver* v. *Bach*, 26 Colo. 530 (1899); *Allen* v. *Colorado*, 101 Colo. 498 (1938). In the latter case the court invalidated a statewide Sunday law exempting certain enumerated forms of business because it had "the vice of discriminating where there is no basis for discrimination." *Accord: Springfield* v. *Smith*, 322 Mo. 1129 (1929); *Gaetano Bocci and Sons Co.* v. *Lawndale*, 208 Cal. 720, 284 Pac. 654 (1930); *Ex Parte Ferguson*, 70 P. 2d 1094 (Okla. Ct. Cr. App. 1937); *Ex Parte Hodges*, 83 P. 2d 201 (Okla. Ct. Cr. App. 1938). In *Mt. Vernon* v. *Julian*, 369 Ill. 447 (1938) the court struck down an ordinance as violative of the Federal and State Constitutions, and declared: "Under this ordinance a bakery which sells bread must be closed, but a shoeshining shop which sells cigars and newspapers is unaffected . . . these distinctions appear to us to be entirely arbitrary without relation to the public health, safety, morals or welfare." *Accord: Cowan* v. *Buffalo*, 157 Misc. 71, affirmed, 247 A. D. 591 (1936); *Gronlund* v. *Salt Lake City*, 194 P. 2d 464 (Utah 1948) (wherein the court failed to see the reason for a distinction between the permitted sale of a

can of beer on Sunday and the prohibited sale of a can of orange juice or coffee).

D. The Sabbath Law Has Been Unconstitutionally Administered

The Sabbath Law has consistently been discriminatorily enforced against small butchers and grocers, such as the appellants, and is therefore unconstitutional. The equal protection of the law provision prohibits not merely unequal laws but the unequal administration of equal laws. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *McCabe* v. *Atchison, Topeka and S. F. Ry.*, 235 U. S. 151, 160 (1914). At the trial of these cases, the appellants offered to prove a pattern of discriminatory enforcement within the proscription of the *Yick Wo* case. Defendants sought to prove that for many years some 80 chain drug stores in New York County have consistently and openly violated the Sabbath Law without interference from the police or the District Attorney. The appellants also sought to prove that 68 chain cigar stores in New York County have similarly consistently and openly violated the Sabbath Law without interference and without criminal prosecution. Defendants sought to establish similar unprosecuted violations over a long period of years by commercial and radio and television broadcasting companies and by operators of sports arenas, amusements centers, night clubs and taverns. The court excluded this evidence (Record, fols. 148-158, 202-214). We submit that this exclusion constituted a direct violation of the appellants' constitutional rights and reflects an unconstitutional interpretation of Article 192. (*Ah Sin* v. *Wittman*, 198 U. S. 500 (1905))

It is submitted that the courts of the State of New York have so construed the New York Sabbath Law as to render it violative of the religious guarantees of the First Amendment and the due process and equal protection guarantees

of the Fourteenth Amendment. The extent to which these guarantees are violated by Sunday Laws has never before been considered nor decided by the Supreme Court of the United States. We respectfully submit that the determination of this question is particularly appropriate at this time, in view of the *Everson* and *McCollum* decisions. We submit that the questions presented by this appeal are substantial and that they are of great public importance.

Respectfully submitted,

LEO PFEFFER,
Attorney for Defendants-Appellants.

Washington, D. C., February 13th, 1951.

APPENDIX A

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*,

v.

SAM FRIEDMAN, *Appellant*

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*,

v.

SAM PRASKA, *Appellant*

Argued October 16, 1950; decided December 1, 1950

PER CURIAM. In the light of its historical background, section 2144 of the Penal Law may not reasonably be read into section 2147, dealing with "public selling • • • upon Sunday" (L. 1785-1788, Vol. 2, pp. 679-680; 1 Rev. Stat. of N.Y., 1828 [1st ed.], part I, ch. XX, tit. VIII, art. 8, pp. 675-676; *ibid.* 1836 [2nd ed.], Vol. 1, p. 675; *ibid.* 1845 [3d. ed.], Vol. 1, pp. 849-850; *ibid.* 1851 [4th ed.], Vol. 2, p. 83; *ibid.* 1858 [5th ed.], Vol. 2, p. 936; *ibid.* 1875 [6th ed.], Vol. 2, pp. 928-929; *ibid.* 1881 [7th ed.], Vol. 3, p. 1975; chs. 676, 680, Vol. 1, pp. 913, 917; *ibid.* Vol. 3, [Penal Code], pp. 62-67; *ibid.* 1883, ch. 358, p. 541; *ibid.* 1885, ch. 519, p. 875). The exempting language of those enactments over a period of more than a century and a half refers only to laboring or working and excluding selling. For almost three quarters of a century this has been the uniform interpretation given to the exemption clause by our courts (*Anonymous*, 12 Abb. N. C. 455; *Matter of The Agudath Hakehiloth*, 18 Misc. 717; *People* v. *Adler*, 174 App. Div. 301; *People* v. *Rudnick*, 259 App. Div. 922). Other jurisdictions have reached similar conclusions (*State* v. *Haining*, 131 Kan. 853, 854-855; *Komen* v. *City of St. Louis*, 316 Mo. 9, 17; *Commonwealth* v. *Has*, 122 Mass. 40; *Commonwealth* v. *Starr*, 144 Mass. 359; *Commonwealth* v. *Kirshen*, 194 Mass. 151; *State* v. *Weiss*, 97 Minn. 125, 130).

We are bound to construe statutes as we find them and may not sit in review of the discretion of the Legislature or determine the expediency, wisdom or propriety of its action

on matters within its powers (*Lawrence Constr. Corp.* v. *State of New York*, 293 N. Y. 634, 639; *Matter of Russo* v. *Valentine*, 294 N. Y. 338). A plea that a statute imposes inconvenience or hardship upon a litigant should be addressed to the Legislature; we may not usurp its functions by legislating judicially (*United States* v. *Carolene Products Co.*, 304 U. S. 144).

Nor may we say that section 2147 of the Penal Law is unconstitutional because of infringement upon religious freedom. It is not a "law respecting an establishment of religion, or prohibiting the free exercise thereof" (U. S. Const., 1st Amendt.). It does not set up a church, make attendance upon religious worship compulsory, impose restrictions upon expression of religious belief, work a restriction upon the exercise of religion according to the dictates of one's conscience, provide compulsory support, by taxation or otherwise, of religious institutions, nor in any way enforce or prohibit religion. Although the so-called Sunday laws may be said to have had a religious origin, our statute since 1881 (Penal Code, § 259, now Penal Law, § 2140) has also recognized that the first day of the week by general consent is set apart "for rest", in accord with the general experience of mankind that it is wise and necessary to set apart such a day at stated intervals for both the physical and moral welfare of the members of a State or community. The power of the Legislature to regulate the observance of Sunday as a civil and political institution is well settled (*Soon Hing* v. *Crowley*, 113 U. S. 703, 710; *Hennington* v. *Georgia*, 163 U. S. 299, 304, 317; *Petit* v. *Minnesota*, 177 U. S. 164, 165; *People* v. *Moses*, 140 N. Y. 214, 215, *People* v. *Havnor*, 149 N. Y. 195, 201-203, writ of error dismissed *sub nom. Havnor* v. *New York*, 170 U. S. 408; *Silverberg Bros.* v. *Douglass*, 62 Misc. 340, 342; see, also *People* v. *Dunford*, 207 N. Y. 17, 20; *People ex rel. Woodin* v. *Hafan*, 36 Misc. 349; 50 Am. Jur., Sundays and Holidays, pp. 803-804). The cases cited by appellants involve completely dissimilar fact patterns. Section 161 of the Labor Law is for the benefit of the *individual* workman, and is not a substitute for the Sunday laws, which establish a *general* day of rest and repose for the community as a whole.

Section 2147 may not be said to deny the equal protection guaranteed by the Fourteenth Amendment by reason of being discriminatory class legislation. The statutory scheme is that of a general prohibition against specified activities on Sunday with some exceptions as to necessities, recreation and conveniences, many of which exceptions merely emphasize that the Legislature recognizes Sunday as a day for rest, play, relaxation and recreation rather than merely as a religious Sabbath. The statutory scheme viewed as a whole is a valid one and does not constitute discrimination (*Petit* v. *Minnesota, supra; People* v. *Dunford, supra; People* v. *Havnor, supra; People* v. *Moses, supra; Silverberg Bros.* v. *Douglass, supra*). While the statute may not be perfectly symmetrical in its pattern of exclusions and inclusions, the equal protection of the laws does not require a Legislature to achieve "abstract symmetry" (*Patsone* v. *Pennsylvania*, 232 U. S. 138, 144) or to classify with "mathematical nicety" (*Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78; *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 209).

Finally, the claim that the statute has been consistently enforced discriminatorily in violation of the equal protection clause of the Fourteenth Amendment and section 11 of article I of the New York State Constitution is without merit (*Snowden* v. *Hughes*, 321 U. S. 1, 8). The offer of proof was not an offer to show a pattern of discrimination consciously practiced, as in *Yick Wo.* v. *Hopkins* (118 U. S. 356); it merely indicated some nonenforcement as to certain other business many of which were allowed to remain open for the sale of permitted commodities.

The defendants' remedy lies with the Legislature.

The judgment of the Appellate Division should be affirmed.

Loughran, Ch. J., Lewish, Conway, Desmond, Dye, Fuld and Froessel, JJ., concur.

Judgment affirmed.

APPENDIX B

Article 192—Sabbath

§ 2140. The Sabbath

The first day of the week being by general consent set apart for rest and religious uses, the law prohibits the doing on that day of certain acts hereinafter specified, which are serious interruptions of the repose and religious liberty of the community.

§ 2141. Sabbath breaking

A violation of the foregoing prohibition is Sabbath breaking.

§ 2142. Punishment for Sabbath breaking

Sabbath breaking is a misdemeanor, punishable by a fine not less than five dollars and not more than ten dollars, or by imprisonment in a county jail not exceeding five days, or by both, but for a second or other offense, where the party shall have been previously convicted, it shall be punishable by a fine not less than ten dollars and not more than twenty dollars, or by imprisonment in a county jail not less than five nor more than twenty days, or both. As amended L. 1950, c. 511, eff. April 8, 1950.

§ 2143. Labor prohibited on Sunday

All labor on Sunday is prohibited, excepting the works of necessity and charity. In works of necessity or charity is included whatever is needful during the day for the good order, health or comfort of the community.

§ 2144. Persons observing another day as a Sabbath

It is a sufficient defense to a prosecution for work or labor on the first day of the week that the defendant uniformly keeps another day of the week as holy time, and does not labor on that day, and that the labor complained of was done in such manner as not to interrupt or disturb

other persons in observing the first day of the week as holy time.

§ 2145. Public sports on Sunday

All shooting, hunting, playing, horse-racing, gaming or other public sports, exercises or shows, upon the first day of the week, and all noise unreasonably disturbing the peace of the day are prohibited.

Notwithstanding the provisions of this section or of any general or local act, it shall be lawful to play baseball games, basketball games, soccer games, hockey games and football games on the first day of the week after two o'clock in the afternoon and to witness which an admission fee may or may not be charged, and to conduct or participate in games of bowling on said day after two o'clock in the afternoon and to participate in or witness which an admission or other fee may or may not be charged, in a city, town or village, if an ordinance shall have been adopted by the common council or other legislative governing body of the city, town or village permitting such games, respectively, on such day and after such hour. As amended L. 1949. c. 655, eff. April 1st, 1949.

§ 2146. Trades, manufactures, and mechanical employments prohibited on Sunday

All trades, manufactures, agricultural or mechanical employments upon the first day of the week are prohibited, except that when the same are works of necessity they may be performed on that day in their usual and orderly manner, so as not to interfere with the repose and religious liberty of the community.

§ 2147. Public traffic on Sunday

All manner of public selling or offering for sale of any property upon Sunday is prohibited, except as follows:

1. Articles of food may be sold, served, supplied and delivered at any time before ten o'clock in the morning;
2. Meals may be sold to be eaten on the premises where sold at any time of the day;

3. Caterers may serve meals to their patrons at any time of the day;

4. Prepared tobacco, bread, milk, eggs, ice, soda-water, fruit, flowers, confectionery, souvenirs, newspapers, gasoline, oil, tires, drugs, medicines and surgical instruments, may be sold in places other than a room where spirituous or malt liquors or wines are kept or offered for sale and may be delivered at any time of the day.

5. Delicatessen dealers and bakeries may sell, supply, serve and deliver cooked and prepared foods, between the hours of four o'clock in the afternoon and half past seven o'clock in the evening, in addition to the time provided for in subdivision one hereof, and elsewhere than in cities and villages having a population of forty thousand or more, delicatessen dealers, bakeries and farmers' markets or roadside stands selling fresh vegetables and other farm produce, and fishing tackle and bait stores may sell, supply, serve and deliver merchandise usually sold by them, at any time of the day. As amended L. 1950, eff. April 17, 1950.

6. Persons, firms or corporations holding licenses and/or permits issued under the provisions of the alcoholic beverage control law permitting the sale of beer at retail, may sell such beverages at retail on Sunday before three antemeridian and after one post-meridian for off-premises consumption to persons making purchases at the licensed premises to be taken by them from the licensed premises.

The provisions of this section, however, shall not be construed to allow or permit the public sale or exposing for sale or delivery of uncooked flesh foods, or meats, fresh or salt, at any hour or time of the day. Delicatessen dealers shall not be considered as caterers within subdivision three hereof. As amended L. 1913, c. 346; L. 1915, c. 278; L. 1921, c. 299; L. 1935, c. 191; L. 1941, c. 878; L. 1942, c. 651, §§ 1, 2, eff. May 5, 1942.

§ 2148. Serving process on Sunday

All service of legal process, of any kind whatever, on the first day of the week is prohibited, except in cases of breach of the peace or apprehended breach of the peace or when

sued out for the apprehension of a person charged with crime, or except where such service is specially authorized by statute. Service of any process upon said day except as herein permitted is absolutely void for any and every purpose whatsoever.

§ 2149. Forfeiture of commodities exposed for sale on Sunday

In addition to the penalty imposed by section twenty-one hundred and forty-two, all property and commodities exposed for sale on the first day of the week in violation of the provisions of this article shall be forfeited. Upon conviction of the offender by a justice of the peace of a county, or by any police justice or magistrate, such officer shall issue a warrant for the seizure of the forfeited articles, which, when seized, shall be sold on one day's notice, and the proceeds paid to the overseers of the poor, for the use of the poor of the town or city.

§ 2150. Maliciously serving process on Saturday on person who keeps Saturday as holy time

Whoever maliciously procures any process in a civil action to be served on Saturday, upon any person who keeps Saturday as holy time, and does not labor on that day, or serves upon him any process returnable on that day, or maliciously procures any civil action to which such person is a party to be adjourned to that day for trial, is guilty of a misdemeanor.

§ 2151. Processions and parades on Sunday

All processions and parades on Sunday in any city, excepting only funeral processions for the actual burial of the dead, and processions to and from a place of worship in connection with a religious service there celebrated, are forbidden; and in such excepted cases there shall be no music, fireworks, discharge of cannon or firearms, or other disturbing noise. At a military funeral, or at the funeral of a United States soldier, sailor or marine, or of a national guardsman, or of a deceased member of an association of

veteran soldiers, sailors or marines, or of a disbanded militia regiment, or of a secret fraternal society, or of an association of employees of the national, state, or municipal governments, music may be played while escorting the body; also in patriotic military processions on Sunday previous to Decoration day, known as Memorial Sunday, to cemeteries or places where memorial services are held, and also by organizations of the national guard or naval militia or of an association of employees of the national, state, or municipal governments, attending religious services on Sunday; but in no case within one block of a place of worship where service is then being celebrated. Music may also be played in any procession conducted by a religious organization or society in connection with a religious service or religious rally after one o'clock noon on Sunday. A person willfully violating any provision of this section is punishable by a fine not exceeding twenty dollars or imprisonment not exceeding ten days, or by both. As amended L. 1911, c. 147; L. 1913, c. 16; L. 1914, c. 328; L. 1923, c. 70, eff. Sept. 1, 1923.

§ 2152. Theatrical and other performances on Sunday

The performance of any tragedy, comedy, opera, ballet, farce, negro minstrelsy, negro or other dancing, wrestling, boxing with or without gloves, sparring contest, trial of strength, or any part or parts therein, or any circus, equestrian or dramatic performance or exercise, or any performance or exercise of jugglers, acrobats, club performances or rope dancers on the first day of the week is forbidden; and every person aiding in such exhibition, performance or exercise by advertisement, posting or otherwise, and every owner or lessee of any garden, building or other room, place or structure, who leases or lets the same for the purpose of any such exhibition, performance or exercise, or who assents to the use of the same, for any such purpose, if it be so used, is guilty of a misdemeanor.

In addition to the punishment therefor provided by statute, every person violating this section is subject to a penalty of five hundred dollars, which penalty "The Society for the Reformation of Juvenile Delinquents" in the city of New York, for the use of that society, and the overseers of

the poor in any other city or town, for the use of the poor, are authorized, in the name of the people of this state, to recover.

Besides this penalty, every such exhibition, performance or exercise, of itself, annuls any license which may have been previously obtained by the manager, superintendent, agent, owner or lessee, using or letting such building, garden, room, place or other structure, or consenting to such exhibition, performance or exercise.

§ 2152-a.

Notwithstanding the provisions of the preceding section or of any local law, it shall be lawful to perform concert and recital dances on the first day of the week after two o'clock in the afternoon and to witness which an admission fee may or may not be charged, in a city, town or village, if an ordinance shall have been adopted by the common council or other legislative governing body of the city, town or village permitting such dancing on such day and after such hour, provided such concert and recital dances are not included as a part of any then current theatrical or other production and have not been performed more than three consecutive times during the six days preceding such first day of the week. Added L. 1932, c. 628, eff. April 4, 1932.

§ 2153. Barbering on Sunday

Any person who carries on or engages in the business of shaving, hair cutting or other work of a barber on the first day of the week, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five dollars; and upon a second conviction for a like offense shall be fined not less than ten dollars and not more than twenty-five dollars, or be imprisoned in the county jail for a period of not less than ten days, nor more than twenty-five days, or be punishable by both such fine and such imprisonment at the discretion of the court or magistrate. As amended L. 1926, c. 835, eff. July 1, 1926.

§ 2154. Motion picture exhibitions, dramatic and musical productions on the first day of the week

If in any city, town or village motion pictures, legitimate theatre productions, such as dramatic and musical productions are now exhibited on the first day of the week, they may continue to be so exhibited during such time after two o'clock in the afternoon as the exhibition of such pictures, productions and performances shall not have been prohibited by an ordinance hereafter adopted by the common council or other legislative body of such city, town or village, the adoption, repeal or re-adoption of which is hereby authorized. If in any city, town or village such pictures, productions and performances are not now exhibited on the first day of the week, they shall not be so exhibited except during such time after two o'clock in the afternoon as shall be permitted by an ordinance hereafter adopted by the common council or other legislative body of such city, town or village, the adoption, repeal or re-adoption of which is hereby authorized. Provided any law adopted by the legislative body of a city, town or village, which shall authorize the exhibition on the first day of the week of dramatic and musical productions, shall be invalid unless it conforms to section one hundred and sixty-one of the labor law. Added L. 1919, c. 257; amended L. 1935, c. 410, eff. April 23, 1935.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 640

SAM FRIEDMAN AND SAM PRASKA,
Appellants,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

FRANK HOGAN,
District Attorney, New York County,

RICHARD G. DENZER,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 640

SAM FRIEDMAN AND SAM PRASKA,
Appellants,

against

THE PEOPLE OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

May it Please The Court:

Now come appellees and move that the appeal be dismissed, or in the alternative that the final judgment appealed from be affirmed.

Preliminary Statement

These are appeals pursuant to § 1257 (2) of the Judicial Code [28 U. S. C. A. 1257 (2)] from final judgments of the New York Court of Appeals affirming convictions of appellants in the Court of Special Sessions of the City of New York, New York County, of the crime of Public Traffic On Sunday (New York Penal Law § 2147). The opinion of the Court of Appeals is published at 302 N. Y. 75. This appeal was allowed by Mr. Justice Jackson.

Introduction

Appellants are proprietors of kosher butcher shops in New York City. Both are adherents of the Jewish faith. In the trial court they conceded violations of the law by selling uncooked meat on Sunday and frankly stated their purpose to prepare a test case (Record, fols. 41-8, 176-9, 236-9).[1] On the side of the prosecution, the Hebrew Butcher Workers' Union of Greater New York, AFL, and five kosher butchers' associations appeared as *amici curiae* to state their interest in the preservation of Sunday as a legally enforced day of rest (Record, fols. 43, 49-50, 56-8).

Appellants base their appeal to this Court upon contentions: (1) that Article 192 of the New York Penal Law is a law respecting an establishment of religion and restraining their religious liberty; (2) that it is discriminatory because while requiring butcher shops to be closed on Sunday it allows stores of certain other types to remain open; and (3) that it has been unequally enforced.

The Statute

Article 192 of the New York Penal Law (§§ 2140-2154) constitutes a comprehensive legislative scheme, setting apart Sunday as a day of rest from labor while permitting the continuance of certain activities necessary to the public safety, convenience or recreation.

Section 2147, the one particularly here involved, deals with public traffic on Sunday. It prohibits "All manner of public selling or offering for sale of any property" except certain foods, alcoholic beverages, tobacco, ice, sodawater, flowers, souvenirs, newspapers, gasoline, oil, tires, drugs,

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[1] Folio references are to the printed record in the Court of Appeals.

medicines and surgical instruments. It also specifically states:

> "The provisions of this section, however, shall not be construed to allow or permit the public sale or exposing for sale or delivery of uncooked flesh foods, or meats, fresh or salt, at any hour or time of the day."

Point I

No Substantial Question Is Presented

A. *Article 192 is a valid health measure and does not impair religious liberty*

Although the observance of Sunday as a day of rest is, along with many of our customs, of religious origin, it now exists as a civil institution serving the public need for a general day of rest and recreation without interference from commercial activity. [*Hennington* v. *Georgia*, 163 U. S. 299, 304-307; *Petit* v. *Minnesota*, 177 U. S. 164, 165; *Soon Hing* v. *Crowley*, 113 U. S. 703, 710; *People* v. *Havnor*, *supra*, 149 N. Y. 195, 202-204; *Lindenmuller* v. *People* (N. Y. Gen. T. 1861) 33 Barb. 548, 568; *Commonwealth* v. *Has* (1877) 122 Mass. 40, 42].

The choice of the day of rest being within the discretion of the legislature, it was entirely natural that it should choose the one which was already by custom treated as a holiday by the greatest number of citizens [*Hennington* v. *Georgia*, *supra*, 163 U. S. 299, 304, 306-307; *People* v. *Havnor*, *supra*, 149 N. Y. 195, 203; *Lindenmuller* v. *People*, *supra*, 33 Barb. 548, 569].

B. *There was no Showing of Purposeful Discrimination*

The exemptions contained in the Sunday law, in favor of certain activities considered to be necessary to the public safety, comfort and convenience, and appropriate to the

observance of Sunday as a day of relaxation and recreation, are reasonable, and their determination is properly the function of the legislature [*Petit* v. *Minnesota*, 177 U. S. 164; *People* v. *Dunford*, *supra*, 207 N. Y. 17, 20; *People* v. *Havnor*, *supra*, 149 N. Y. 195, 205]. The fact that the legislature has made explicit its intent that the sale of uncooked meat be not considered one of these appropriate activities does not constitute discrimination (*cf. Petit* v. *Minnesota*, 177 U. S. 164, 165-166).

Appellants' questionable contention that broadcasting companies, sports arenas and amusement enterprises have violated other sections of the law than the one here in issue (Statement of Jurisdiction, pp. 4, 12) has no place in the present discussion. The offer of proof that cigar and drug stores, properly open for the sale of permitted commodities, in some instances sold other commodities without incurring prosecution for violation of § 2147 was properly rejected as irrelevant [Record, fols. 148-51, 202-6; *cf. Snowden* v. *Hughes*, 321 U. S. 1, 8; *Thompson* v. *Spear* (C. C. A. 5th 1937) 91 Fed. (2d) 430, 433-434, cert. den. 302 U. S. 762; *Boynton* v. *Fox West Coast Theatres Corporation* (C. C. A. 10th 1932) 60 Fed. (2d) 851, 854; *Buxbom* v. *City of Riverside* (D. C. Cal. 1939) 29 Fed. Supp. 3, 8; *People* v. *Oreck* (1946) 74 Cal. App. (2d) 215, 168 Pac. (2d) 186, 190-191; *State* v. *Sage Stores Co.* (1943) 157 Kan. 404, 141 Pac. (2d) 655, 662, rehearing den. 157 Kan. 622, 143 Pac. (2d) 652, aff'd 323 U. S. 32].

As was observed by Mr. Justice Frankfurter, concurring, in *Snowden* v. *Hughes*, 321 U. S. 1, 15:

> "The Constitution does not assure uniformity of decisions or immunity from merely erroneous action, whether by the courts or the executive agencies of a state. * * * in order to give rise to a constitutional grievance a departure from a norm must be rooted in

design and not derived merely from error or fallible judgment."

Conclusion

Appellants' contentions are insubstantial and foreclosed by previous decisions of the Court. The appeal should therefore be dismissed, or in the alternative the judgments appealed from should be affirmed.

Respectfully submitted,

FRANK S. HOGAN,
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Assistant District Attorneys,
Of Counsel.

MARCH, 1951.

No. 640. FRIEDMAN ET AL. *v.* NEW YORK. Appeal from the Court of Appeals of New York. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Leo Pfeffer* for appellants. *Frank Hogan* for appellee. Reported below: 302 N. Y. 75, 96 N. E. 2d 184.

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